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May 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 21, 2004
Case No.: TIA-0277

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a manager, supervisor and technician at the DOE's Nevada Test Site (NTS) for approximately 35 years, from 1958 to 1993.

The Applicant filed an application with the OWA, requesting physician panel review of four illnesses, hypertension, hearing loss, hyperglycemia, and renal failure. The Applicant claimed that the Worker's illnesses were the result of being exposed to toxic substances during his work at DOE sites.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel noted that although the Worker's employment history form states that he was temporarily assigned to Johnson Island, Los Alamos and Sandia National Laboratories, there was no exposure

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g)

information related to these sites in the record. Based on the available information regarding the Worker's exposure to toxic substances and ionizing radiation at NTS, the Panel concluded that his hypertension and renal failure did not arise out of his DOE employment. With respect to the claims of hyperglycemia and hearing loss, the Panel noted that there was insufficient information in the record to establish that the Worker had these illnesses.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. She states that due to the nature of his work, the Worker was likely exposed to more radiation than what is noted in the record. The Applicant states that she is in the process of gathering additional medical and occupational records from the sites.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

In processing applications, the OWA requests that the site provide relevant information. In this case, the OWA requested information from NTS, but no other sites. Since the Worker was involved in various phases of nuclear testing at other sites, it is possible that additional exposure information exists. Accordingly, the OWA should determine whether other locations might contain information for the Worker's temporary duty assignments. Finally, if the Applicant has identified additional information, she should consult the DOL as to how to submit it.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's grant of this appeal does not purport to dispose of or in any way

prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0277 be, and hereby is, granted.
- (2) Further consideration of the application is warranted.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2005